IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 14, 2008

HUBERT L. WALTON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Maury County
No. 15677 Robert L. Jones, Judge

No. M2007-02549-CCA-R3-PC - Filed July 2, 2008

A Maury County grand jury indicted the Petitioner, Hubert L. Walton, on five counts of rape of a child and five counts of incest. The Petitioner pled *nolo contendere* to five counts of aggravated sexual battery and five counts of incest. The trial court sentenced him to an effective ten year sentence with no eligibility for probation. The Petitioner brought a petition for post-conviction relief, claiming that he received the ineffective assistance of counsel. The post-conviction court denied him relief, and he now appeals. After a thorough review of the record and the applicable law, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS, JJ., joined.

Robert C. Richardson, Jr., Columbia, Tennessee, for the Petitioner, Hubert L. Walton.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; T. Michael Bottoms, District Attorney General; John W. Castleman, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

At the post-conviction hearing, the following evidence was presented: the Petitioner's trial counsel ("Counsel") testified that she represented the Petitioner at his *nolo contendere* hearing and at the sentencing hearing. She said that, normally, she would have attended the preliminary hearing but did not in this case because the Petitioner chose not to have one. She said, "He did not want to put his --- the chance of his children getting on the stand, and he did not want to have a preliminary hearing." Counsel said she had at least one lengthy meeting with the Petitioner and probably spent a total of three to five hours with him. When she discussed the chances of success at trial with the Petitioner, she specifically talked about the effect of his confession to the police. Counsel admitted that she did not speak with the victims or with the Department of Children Services counselor assigned to them, but she did have several phone conversations with the Petitioner's mother. Summing up the Petitioner's case, Counsel stated, "So in assessing [his] case, I had where the daughter had disclosed to a neighbor; had disclosed [to] the grandmother; and then further follow-up with Cory Cooper [the Detective who took the Petitioner's statement], I had, where the child responded, 'Daddy did it. He did it in a room.'" She also said that the State initially offered a twelve year sentence, which she discussed with the Petitioner, and she explained that the potential maximum sentence he could receive would be 125 years. While they were in court, the State offered ten years.

On cross-examination, Counsel said, "And I wouldn't have waived that [preliminary] hearing, because to tell you quite honestly, as I have handled a number of those cases, my philosophy is not to waive, because I don't generally get an opportunity to see the witness at that time. And [the Petitioner] was very clear that he did not want to put his children through that." She said that the Petitioner entered the plea on his own and that she discussed the differences between concurrent and consecutive sentences with him.

The Petitioner then testified that Counsel did not effectively represent him. He said Counsel failed to investigate the handwritten notes taken by the detective who took his statement. The Petitioner believed those notes contained additional information that was omitted from the discovery file. Additionally, the Petitioner said Counsel did not sufficiently raise the issue that the Petitioner confessed at the police station before he was read his rights. He admitted that he went to the police station voluntarily. He also claimed Counsel spent too little time with him, and she supported him taking the ten year plea deal, which he did not want to take. However, the Petitioner then testified, "As for taking the plea, I really didn't know what else to do. It was basically either take the plea or go to trial and get a lot of time."

On cross-examination, the Petitioner said he "just gave up" when Counsel told him to "take the plea." He said he did not want his children in the courtroom. Additionally, he testified that his children asked when he was going to come home. He also mentioned that his mother wrote Counsel a letter explaining the Petitioner was molested as a young child, so he needed psychiatric help instead of incarceration.

The trial court ruled the Petitioner failed to carry his burden of proof. It found the Petitioner "ha[d] not been persuasive . . . in convincing the Court that [his] plea was no[t] voluntary or that [Counsel] was not effective." The Court continued, "We talked for a long time about that when you entered your plea . . . and you had opportunities then to talk with me about the circumstances of the confession and other things, if you thought that the settlement was not fair or you should not be doing it." The Court also focused on the fact that the Petitioner was the one who did not want his children to testify. The Court denied the petition for post-conviction relief. It is from that judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner alleges that he did not receive the effective assistance of counsel because Counsel failed to prepare and investigate his case, failed to argue pre-trial motions, and failed to ensure his plea was entered knowingly and voluntarily. The State counters that the Petitioner did not show deficient representation or prejudice. We agree with the State.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant

circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "In considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

In this case, the Petitioner failed to demonstrate Counsel was ineffective. He first claims she should have investigated the notes handwritten by the detective who took his statement, and she should have interviewed the victims, his children. The Petitioner failed to present any evidence at the post-conviction hearing proving the content of the handwritten notes or providing information about what the interviews with his children would have revealed. In Tennessee, the petitioner must meet a rigorous test to prove that Counsel's failure to present a witness was prejudicial:

> [W]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, . . . the petitioner [must prove] that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.

State v. Black, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Without proof of what that evidence would have shown, and that without the evidence the Petitioner received an unfair trial, we cannot

grant the Petitioner relief on this claim.

The Petitioner also claims Counsel failed to adequately argue his pre-trial motions. We point out that the Petitioner did not want his children to be required to testify, so he chose to waive his preliminary hearing. In fact, Counsel said she normally recommends a preliminary hearing in order to gain a chance to view the State's witnesses. The Petitioner has failed to show how Counsel was ineffective by following his instructions. Further the Petitioner failed to present evidence at the post-conviction hearing to prove that any pre-trial motions could have been successfully pursued by Counsel.

Finally, the Petitioner claims Counsel failed to ensure his guilty plea was knowingly and voluntarily entered. When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. *See State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). The circumstances include:

> The relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing *Caudill v. Jago*, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." *Id.*

Reviewing the guilty plea hearing transcript, we note the trial court questioned the Petitioner at great length to make sure his guilty plea was voluntarily and knowingly entered. Additionally, Counsel said she relayed the State's offer to the Petitioner, and she also explained to him the differences between concurrent and consecutive sentencing and the potential maximum amount of time he faced. The Petitioner has not proven that his guilty plea was not knowingly and voluntarily entered. Moreover, the Petitioner admitted that he took the plea deal because he "didn't know what else to do. It was basically either take the plea or go to trial and get a lot of time." The Petitioner is not entitled to relief on this issue.

III. Conclusion

We conclude that the Petitioner failed to prove that the post-conviction court erred when it denied his petition for post-conviction relief. The Petitioner failed to prove that he received the

ineffective assistance of Counsel. Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

ROBERT W. WEDEMEYER, JUDGE